

## Memorandum

To: Julie Dubick  
From: James Ingram  
Re: Proposed language regarding appointments to outside organizations  
Date: August 21, 2007

---

The Subcommittee requested that staff work with the City Attorney's representatives in order to arrive at compromise language as to the appointment of City representatives to outside organizations. The differences between the positions of SDCRC staff and the City Attorney's representatives have proven irreconcilable. There have been several pleasant conversations and email exchanges, but this communication has not resolved the divergence of opinions.

The City Attorney's representatives may assist the Subcommittee as to improving the form of recommended Charter language, but are not authorized to take a position as to recommending its content. In terms of form, they have contended that making the Mayor the nominating authority and the Council the appointing authority would violate controlling law. According to their position, the only way to render the proposed language acceptable would be to allow both the Mayor and the Council to nominate individuals, and then to permit the Council to make the appointments. This would be tantamount to awarding the Council sole control over both the nomination and the appointment of the City's representatives to outside organizations. The Council could simply ignore the Mayor's nominees and appoint whomever its members wished. To make the change recommended by the City Attorney's representatives would make it pointless to even add this proposed language to the Charter.

It is a supreme irony that, according to the interpretation of the City Attorney's Office, the Mayor enjoyed more appointment authority over the City's representatives to outside organizations before Prop F than the Mayor does in acting as City CEO today. The terms of Council Policy 13 granted the Mayor a role in these decisions under Council Policy 13, whereas the Mayor has no guaranteed authority in these decisions at present. To create such a convoluted appointment process as the City Attorney's representatives have indicated is necessary would violate the voter's clear intent in enacting Prop F and naming the Mayor as the head of the executive branch of City government. Furthermore, even if the Subcommittee were to make the changes in language recommended by the City Attorney's representatives, they would still not be authorized to endorse the proposed language. All this would do is to address their objections as to form. If the Subcommittee wishes to dismiss the objections raised by the City Attorney's representatives—which they have candidly admitted have not been substantiated by a single case—then it could recommend language that would provide for the kind of executive-legislative checks and balances system that voters ratified when they passed Prop F.

The staff recommendation would be that because the Subcommittee has expressed support for establishing an appointment process that follows the lines of the federal model, the members might want to adopt some version of the language proposed below. If the language is reviewed by the City Council and approved by the voters, then perhaps at some future date litigation may address its permissibility. There is never certainty as to whether any city charter changes will be approved by the courts. If the Subcommittee were to refrain from making any changes because of

the possibility of a future court challenge, then it would make no recommendations whatsoever. The absence of guarantees as to the probability any specific charter change will withstand a legal challenge accounts for the literally hundreds of pages of judicial opinions regarding these amendments since California cities began ratifying home rule charters in 1889.

#### *Proposed Charter Language*

### **Section 265: The Mayor**

###

(b) In addition to exercising the authority, power, and responsibilities formally conferred upon the City Manager as described in section 260(b), the Mayor shall have the following additional rights, powers, and duties:

###

(13) Sole authority to appoint City representative to boards, commissions, committees and governmental agencies, unless controlling law vests the power of appointment with the City Council or a City Official other than the Mayor.

(A) For all boards, commissions, committees, agencies, or other entities for which controlling law requires or authorizes the City Council to act as the appointing authority, the following appointment procedure shall be employed:

(i) The Mayor shall nominate each member of the board, commission, committee, agency, or other entity, subject to confirmation by the Council.

(ii) The Council may recommend individuals to be nominated, for consideration as the Mayor's nominee.

(iii) The Council shall act to appoint or reject the Mayor's nominee within forty five days after submission of the nomination to the Council.

(iv) If the Mayor fails to nominate a member within ninety days after a vacancy first exists, the Council shall appoint the member.

(v) If the Mayor submits a nomination to the Council within said ninety day period and the Council rejects the nominee, the Mayor shall make a new nomination within ninety days of the rejection.

(B) The nomination procedure set forth in section A, above, shall not apply to a redevelopment agency or housing authority established under state law where the City Council has declared itself to be the agency or authority.

#### *Staff Analysis*

Subcommittee members raised concerns as to two of the subsections above:

The first subsection needing further discussion was Section 13(A)(ii). This language was added because the members requested it at a previous meeting. It was in part to address the fact that City Attorney's representatives had stated that allowing the Council no role in suggesting nominees might be problematic. As their fears have

still not been assuaged, the Subcommittee could choose to leave this implicit by removing this subsection, or leave it in if they see it as addressing the issues raised by the City Attorney's representatives.

The second subsection needing further discussion was Section 13(A)(iii). The 45-day timeline for Council action is drawn from the present Charter. It makes sense to allow the Mayor 90 days to suggest nominees because finding suitable candidates is a time-consuming process. However, it may not be necessary for the Council to have the same 90-day period to assess those nominees. The Mayor would presumably have filtered the potential pool, and then the Council could act upon them. The Council is not required to suggest nominees, but could use the same 90-day period to arrive at and suggest its own alternative nominees, which the Mayor could approve and nominate to the Council, if appropriate. These time frames can easily be altered, at the Subcommittee's request for different periods for any of the phases of the appointment process.

In sum, the language proposed makes the Council the appointing authority. No one could ever be appointed as the City's representative to any outside organization without the Council's approval. The staff recommends the above language, subject to any improvements made by the Subcommittee. However, the staff stands ready to assist the Subcommittee with any alternative language. As a policy choice, this is obviously not the staff's decision to make.